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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,
Petitioner,

v.

ALVORD-POLK, INC., et al.,
Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents[1] respectfully file this brief to set forth reasons why the petition for a writ of certiorari should not issue pursuant to Supreme Court Rule 10.

COUNTERSTATEMENT OF THE CASE

This antitrust action was brought by ten 800-number wallpaper dealers (respondents herein) against petitioner, the National Decorating Products Association, Inc. ("NDPA"), a retailers' trade association, and F. Schumacher & Co. ("FSC"), an influential wallpaper manufacturer.[2] Respondents allege that these entities conspired to force the 800-number dealers out of business.[3] At the close of fact discovery, NDPA and FSC obtained summary judgment in the district court. This grant of summary judgment was initially affirmed by the Third Circuit Court of Appeals,

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[1]Pursuant to Supreme Court Rule 29.1, respondent corporations state that they have no corporate parents or subsidiaries, with the exception of respondent American Blind Factory, Inc., which is a subsidiary of Color Tile Corporation.

[2] NDPA's petition describes FSC as "nominally a respondent in this Court." Petition at 3, n.1. However, FSC filed its own certiorari petition in Case No. 94-1278, to which a separate response has been filed. Thus, in this brief, the term "respondents" refers only to the plaintiffs below.

[3]Count I of respondents' amended complaint alleges that NDPA conducted a systematic campaign to coerce wallcovering manufacturers to refrain from dealing with 800-number dealers in violation of Section 1 of the Sherman Act. CA App. 103-107. Count II alleges that FSC, in response to NDPA coercion and in furtherance of NDPA's objectives, imposed restraints that had the purpose and effect of eliminating 800-number dealers as competitors of NDPA showroom dealers. CA App. 108.

App., A67-A114, but was subsequently reversed by that court on panel rehearing as to Counts I, II and the corresponding portion of Count VI of respondents' amended complaint, App., A1-A40. FSC's petition for rehearing in banc was denied. App., A188-A189.

As set forth in more detail below, the petition commits four main errors: (1) it sets forth only those facts that favor NDPA and FSC, while completely ignoring the facts favorable to respondents; (2) it attempts to manufacture a non-existent conflict among circuit court decisions concerning the inferences that may be drawn from circumstantial evidence of pretext regarding the existence of a conspiracy; (3) it incorrectly hypothesizes a conflict between the Third Circuit's decision below and this Court's analysis of Section 1 in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); and (4) it incorrectly argues that the Third Circuit's decision below contravenes and improperly extends this Court's decision in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

Factual Background. NDPA's statement of the facts (petition at 4-8) omits critical facts demonstrating that NDPA, a trade association acting as a combination of its members, pressured FSC to eliminate 800-number dealers as competitors of the retailers, and that FSC capitulated to such pressure. The Court of Appeals' opinion recites many of the relevant facts concerning both NDPA and FSC. *See* App., A10-A21. The following brief outline of the facts highlights key points that were omitted from NDPA's petition.

The NDPA consists of 3,300 wallcovering dealers who formed a trade association for the purpose, *inter alia*, of hiring professional managers to advance the common

economic interests of NDPA members. CA App. 283. Robert E. Petit, NDPA's Executive Vice-President and Chief Executive Officer, is a professional manager who was a full time employee of NDPA for 30 years. CA App. 1972, 2001-2002. John Rogers, the editor of *Decorating Retailer* and other NDPA publications, was employed by NDPA for 15 years. CA App. 368. Each year, NDPA elects a different president from its membership of wallcovering retailers. The court below stated that "it is uncontested that the NDPA is highly sophisticated and possesses significant market power . . ." App., A31.

The NDPA has, for much of its history, worked to eliminate the competitive threat posed to its membership by 800-number dealers, who generally sell wallcovering products at substantially discounted prices. In the early 1980's, Robert Petit frequently urged executives of the major wallcovering manufacturers to take action against 800-number dealers. CA App. 190-206. In addition, NDPA introduced an "anti-piracy kit" for storefront retailers that was intended to prevent retail customers from placing orders with 800-number dealers. CA App. 271-273, 407. Petit also urged each retailer "to send a letter indicating your desire for unpriced books to major manufacturers and/or distributors you currently deal with and send a copy of such correspondence to me at NDPA." CA App. 523.

These overtly anticompetitive acts on the part of NDPA prompted the Federal Trade Commission ("FTC") to initiate an investigation into the activities of NDPA. In May 1985, the FTC issued a complaint against NDPA for the same activity complained of here, *i.e.*, attempting to drive 800-number dealers out of the wallcovering business. App., A13-14; CA App. 364, 410. In 1986, NDPA entered into a

consent order with the FTC whereby NDPA agreed that it would not advocate, suggest, advise or recommend that any of its members refuse to deal with any sellers to attempt to affect prices, terms or conditions of sale or distribution methods. CA App. 411-413. Despite the entry of the consent order, NDPA continued to take action against 800-number dealers that was in direct violation of that order.

In 1988, storefront retailers again began clamoring for manufacturers to take action against 800-number dealers. CA App. 200-201. In order to focus and channel these demands, NDPA filled its publications with editorials (usually written by Petit or Rogers), articles and letters that maligned 800-number dealers, urged manufacturers to take steps to interfere with the business of 800-number dealers, and urged retailers to stop doing business with those manufacturers that failed to do so. CA App. 468, 479, 485, 490-92, 495, 756-59, 784, 837-38. NDPA members, at the urging of the association, also wrote to manufacturers and urged them to take action against 800-number dealers. CA App. 517, 519, 523, 524, 526, 545, 546, 550, 554, 558. NDPA President John Wells, described in an NDPA publication as a "Retailer Spokesman," spoke at an NDPA convention and told retailers to refrain from purchasing from manufacturers who did not support the NDPA against 800-number dealers. CA App. 167, 440.

In addition, NDPA executive Petit spoke to manufacturers and urged them to take steps to eliminate 800-number dealers.[4] CA App. 185, 190-98, 201-07, 212-29,

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[4]For instance, in 1989, Petit urged John Fitzgerald, president of Kinney Wallcovering, to take action against 800-number dealers by

(continued...)

407, 416-19, 693-99, 700. NDPA President Clyde Morgan reported to the NDPA Board of Directors regarding a private meeting that he had with a group of manufacturers who were "leaders of the wallpaper industry" in which he urged them to take action against 800-number dealers. CA App. 177-184. His comments were recorded in NDPA's official board minutes. CA App. 1091.

FSC reacted to this type of pressure by adopting a seven (7%) percent drop shipment surcharge designed to eliminate respondents' profits. CA App. 298-299. Indeed, a draft of a press release prepared by FSC admitted that the surcharge was adopted "*[i]n direct response to [storefront] retailer requests*. . . " to "protect them from sales piracy." CA App. 298-299 (emphasis supplied). The final version of this press release deleted this bit of candor, and stated instead that the surcharge was intended to "insure that our consumers receive the best possible service. . . ." CA App. 486. FSC's management committee minutes, however, confirm that the true objective of the surcharge was "to make statement to industry that we are trying to help them." CA App. 290.

Another purported reason for the drop shipment surcharge was to reimburse FSC for its added costs in making drop shipments. However, no calculation was ever made to determine the amount, if any, of additional costs incurred by FSC in handling drop shipments. CA App. 148-

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[4](...continued)
relating to him the "anger felt by the retailers in lack of support from the wallcovering industry" and "that the piracy issue seems to have intensified." In response, Fitzgerald proposed that he start a new company to handle product lines that would not be available to 800-number dealers. CA App. 185.

151, 685-686. Indeed, another manufacturer stated that drop shipments do not result in any increase in handling costs. CA. App. 622.

Even after the drop shipment charge was instituted, NDPA pressure on FSC continued. FSC president Mike Landau reported to FSC's Management Committee that he had been told at NDPA's Western meeting that while the "surcharge [was a] good first step . . . [it was] necessary to take other measures." CA App. 304. Thereafter, following additional retailer pressure,[5] FSC formulated a new strategy. CA App. 309. On January 25, 1990, FSC adopted a so-called "local trading area" policy, whereby 800-number dealers were prohibited from selling FSC products outside their local area. CA App. 627, 640, 693-699.

The NDPA quickly confirmed that FSC's local trading area restraint constituted an appropriate response to its demands for action against 800-number dealers. CA App. 376-382, 479-482, 492. Robert Petit wrote to the NDPA Board of Directors heralding FSC's local trading area restraint as "a major step forward in *our battle* against the 800 number operators." CA App. 693 (emphasis supplied). He also wrote to FSC's president, expressing "[o]n behalf of the members of our decorating products associations . . . our appreciation for your actions." CA App. 70.

It is clear from a recitation of *all* the relevant facts that there is extensive evidence from which a reasonable jury could infer that the NDPA, a trade association acting as a

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[5]For instance, a letter from one storefront retailer stated clearly: "We will continue to support those companies that support us . . ." CA App. 524.

combination of its members, demanded action, and that FSC capitulated to these demands and agreed to eliminate the 800-number dealers.

Court of Appeals Decision. With respect to Count I, NDPA ignores the court's complete recitation of the facts, including facts that could easily lead a jury to infer that Petit, Wells and Morgan were acting with apparent authority when they urged retailers to boycott manufacturers who did not take steps to eliminate 800-number dealers.

For instance, the court found that NDPA's *Decorating Retailer*, in reporting on anti 800-number speeches given by Wells and Petit, specifically identified their official positions with NDPA and made no reference to any disclaimer that the views expressed in their speeches were their own and not those of the NDPA. App., A20. Further, the court noted that John Rogers, editor of *Decorating Retailer*, admitted that the *Perspective* column, frequently used as a forum for invective against 800-number dealers, has never contravened NDPA's policies. App., A20. This evidence could lead a reasonable jury to conclude that the actions of Petit, Wells, Morgan and Rogers were taken with the apparent authority of NDPA because their actions were fully consistent with the policies of NDPA as enunciated in NDPA's official publication.

NDPA argues that the Court of Appeals' decision eviscerates the requirement of concerted action in a Section 1 case because this case did not involve a conspiracy between NDPA and "another person." Petition at 29. In fact, the court below correctly stated that "a [trade] association, as a combination of its members, can violate the antitrust laws through such a conspiracy." App., A31. Indeed, "when

NDPA takes action it has engaged in concerted action so as to trigger potential section 1 liability." App., A25.

NDPA mischaracterizes the Court of Appeals' decision as to Count II. According to NDPA, the court held that if evidence of pretext exists, then a conspiracy will also, necessarily, be found to exist. Petition at 12-13. The Court of Appeals did not so hold.

Indeed, there was no reason for the court to make such a holding because the evidence in the case provides independent direct evidence of a conspiracy. Thus, it was unnecessary for the court to rely solely on evidence of pretext to infer the existence of a conspiracy. The evidence of pretext merely serves, as the court stated, to "*support* an inference that it acted as part of a conspiracy. . . ." App., A37 (emphasis supplied).

Judge Lewis's opinion on rehearing in the court below, with its lengthy recitation and analysis of the facts of the case, App., A10-A21, shows that the court undertook a complete analysis of the evidence in determining that a jury might well infer from *all* of the evidence that a conspiracy existed between NDPA and FSC.[6]

In Count I, the majority opinion held that reasonable jurors could find that NDPA threatened a retailers' boycott of manufacturers such as FSC. App., A34. Having made this threshold determination, the court then analyzed respondents' evidence against FSC on Count II in the context

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[6]This Court has ruled that a plaintiff's evidence of conspiracy should be viewed as a whole and should not be compartmentalized. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

of its previous finding that a jury could find that storefront retailers, acting through NDPA, conspired to pressure manufacturers to eliminate 800-number dealers from the marketplace. App., A37-A40.

For instance, the court's opinion points out that FSC's drop shipment surcharge was designed to be a "statement" that FSC was trying to help storefront retailers and was adopted "*in direct response to [such] retailer requests.*" App., A38 (emphasis supplied). The court also noted that FSC adopted the surcharge without even attempting to determine whether it would be sufficient to permit it to recoup increased costs associated with drop shipments. App., A39. The court concluded that this evidence would permit reasonable jurors to find that FSC had "agreed with others to impose the surcharge *whether it made economic sense or not.*" App., A40 (emphasis supplied).[7]

In sum, the court carefully examined both pretext evidence and non-pretext evidence in reaching its conclusion that a reasonable jury could infer that a conspiracy existed between NDPA and FSC.

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[7]Judge Roth's dissent to the initial Court of Appeals' opinion, which affirmed summary judgment in favor of FSC and NDPA (the "1993 Opinion"), also makes it clear that there is enough evidence of a conspiracy between NDPA and FSC to go to the jury. Her decision was based in part on her finding that there was sufficient evidence to go to the jury regarding NDPA's alleged anticompetitive activities (Count I) and the effect that allegations of a hybrid horizontal/vertical conspiracy have on the plaintiff's burden under *Monsanto*. *See* App., A128-A129. Further, Judge Roth found evidence of coercion and of pretext. App., A130.

SUMMARY OF ARGUMENT

NDPA's petition for writ of certiorari should be denied. The Third Circuit Court of Appeals' decision (on panel rehearing) is not in conflict with decisions in five other circuits. The court below did not hold, contrary to FSC's assertion, that if a jury can find that pretext is present it can also infer, based solely on that evidence, the existence of a conspiracy. The court considered extensive evidence adduced by plaintiffs that supports an inference that NDPA demanded that action be taken against 800-number dealers and that FSC capitulated to its demands, thus forming a conspiracy between NDPA and FSC. Further, the Third Circuit's decision is not in conflict with this Court's holding in *Monsanto*. Rather, the Third Circuit correctly interpreted and applied *Monsanto* to this case. Finally, the Third Circuit also correctly interpreted and applied the *Hydrolevel* decision to this case.

ARGUMENT

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

I. NDPA'S FIRST QUESTION PRESENTED

A. There Is No Conflict Among The Circuits As To How Evidence Of Pretextual Behavior By A Manufacturer Should Be Considered In A Sherman Act Section 1 Case.

Contrary to NDPA's petition, there is no conflict on this issue among the circuits. In order to fashion a putative conflict, NDPA improperly ignores record evidence and distorts the holding of the court below. NDPA asserts that

the court below held that evidence of pretext alone is sufficient to support a finding of conspiracy consistent with *Monsanto*,[8] and that this supposed holding conflicts with decisions of five other circuits. Petition at i, 15-18.

Underlying NDPA's argument is a fallacious view of the Third Circuit's evaluation of the evidence both of pretext and, more generally, of conspiracy. NDPA misstates the matter, claiming that the court ruled that evidence of pretext alone will support an inference of antitrust conspiracy. That is incorrect. The Court of Appeals carefully analyzed the evidence of concerted action, including extensive evidence of the pressure NDPA exerted upon FSC, and FSC's conduct taken (by its own admission) in direct response to that pressure. The fact that the court determined that a jury could infer that FSC both advanced pretextual reasons for its policies and acted in concert with NDPA, App., A40, does not constitute a holding that evidence of pretext alone will create an inference of antitrust conspiracy.

For example, the court's summary of the evidence adduced by respondents regarding FSC's surcharge specifically mentions both the instances of pretext and the retailer pressure on FSC:

> [V]iewing this evidence *in conjunction with the press releases and the retailer pressure on FSC*, it is not an implausible conclusion that FSC may have imposed the surcharge without first undertaking mathematical calculations because it

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[8]The *Monsanto* case instructs that "there must be evidence that *tends* to exclude the possibility of independent action by the manufacturer and distributor." 465 U.S. at 768 (emphasis supplied).

> had agreed with others to impose the surcharge whether it made economic sense or not.

App., A40 (emphasis supplied). This paragraph alone makes it completely clear that the Court of Appeals was relying on more than pretext evidence when it determined that the order granting summary judgment in favor of NDPA and FSC on Count II should be reversed. As the Court of Appeals found, plaintiffs presented (1) admissible evidence of concerted action; and (2) evidence that tended to exclude the possibility of independent action by FSC.

NDPA nevertheless contends that the Third Circuit's holding, as NDPA mischaracterizes it, conflicts with decisions by the First, Second, Fourth, Seventh and Eighth Circuits. Petition at i. In fact, a review of the all of the post-*Monsanto* circuit court decisions cited by NDPA makes it clear that each of those circuits has determined that, while evidence of pretext may be probative of a Section 1 conspiracy, it will not, standing alone, create an inference that a conspiracy exists.[9]

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[9]In footnote 5 of the petition, NDPA states that prior to *Monsanto*, the First and Seventh Circuits held that evidence of pretext alone will not support an inference of antitrust conspiracy. The two cases cited in the footnote, however, are not inconsistent with the case at bar. *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982), held that there was no evidence of concerted action in the record, and that a supposed business pretext (which the court of appeals did not find pretextual in any event) did not, by itself, prove a conspiracy. That holding is consistent with both *Monsanto* and the decision below. *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978), is to the same effect, holding that a pretextual reason is not, *in and of itself*, proof of conspiracy.

The Second Circuit's decision in *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989), contained the following conclusion: "[T]he mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, *by itself*, justify the inference that the conduct was therefore the result of a conspiracy." 879 F.2d at 1014. *Hayden* does not hold that such evidence may not be considered; it holds only that, standing alone, such evidence cannot create an inference of conspiracy.

In the Fourth Circuit case, *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988), the court determined, we submit erroneously, that, whether or not the proffered reasons for termination were true, the actual reasons for termination of the plaintiff were legitimate. Because of this determination, the court was not required to determine the extent to which evidence of a false pretext gives rise to an inference of conspiracy.

NDPA's claim of a conflict among the circuits relies most heavily on *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994). In *Lovett*, however, the court did not discuss whether evidence of pretext standing alone could support an inference of conspiracy. Indeed, the word "pretext" does not appear in the opinion. Instead, the court properly examined all of the evidence and determined that it was insufficient to support the alleged conspiracy.

Contrary to NDPA's assertion, a "strong parallel between the evidence of pretext" in this case and in *Lovett* does not exist. In *Lovett*, the only evidence that could

conceivably be viewed as pretextual is evidence that GM gave the plaintiff "a less than honest" reason for deciding to cut its allocation. *Id.* at 580. The court considered such evidence as well as all of the other evidence and determined that GM was not acting as part of a conspiracy, but was acting alone. *Id.* at 580-581. There was no evidence in *Lovett* that the defendant, in deciding to cut back the plaintiff's allocation of automobiles, had capitulated to pressure from other automobile dealers. Indeed, there was substantial evidence that GM refused to discuss the dealers' complaints, *id.* at 579-80, and that the dealers were unaware of GM's decision once it was made. *Id.* at 580. Further, there was no evidence that the dealers threatened to terminate their dealerships with GM to coerce GM's actions. *Id.* In short, unlike this case, there was no evidence that GM acted *in response* to dealer pressure. In contrast, FSC has admitted in an internal document that it acted "in direct response to retailer requests. . . ." CA App. 298-299.

Other decisions cited by NDPA in its effort to suggest a "conflict" among the circuits do not hold that evidence of pretext alone is sufficient to infer a conspiracy. For instance, in *Boczar v. Manatee Hospitals & Health Systems, Inc.*, 993 F.2d 1514 (11th Cir. 1993), the Eleventh Circuit separately analyzed evidence of an economic motive for the alleged conspiracy, and evidence tending to exclude the possibility of independent action. In *Boczar*, a physician brought suit against a hospital and several staff physicians for conspiracy to restrain trade in violation of Section 1 of the Sherman Act after her staff privileges at the hospital had been suspended. The court stated that, based on the evidence of both

concerted action and pretext, "the jury may have properly inferred an unlawful conspiracy." *Id.* at 1517-1519.[10]

Similarly, in *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987), a refusal to deal case that was decided under California state law, the Court of Appeals examined evidence of pretext *and* separate evidence tending to support the inference of a conspiracy. The non-pretext evidence of conspiracy included evidence that a proposal for a concerted refusal to deal had been made, and evidence that the two parties to the alleged conspiracy also agreed to "divide the market," and not seek service work in each other's territory. The court clearly did not rely solely on one incident of pretext in determining that the plaintiff had presented evidence tending to support an inference of concerted action.

NDPA has completely misstated the holdings of these Ninth and Eleventh Circuit cases to bolster its argument that a split in the circuits exists on this issue. Clearly, none of these courts, including the Third Circuit in this case, has held that evidence of pretext, standing alone, will support an inference of the existence of a conspiracy. In fact, a review of the above-cited decisions makes it clear that each of the

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[10]The Eleventh Circuit's decisions in *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990) and *DeLong Equipment v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir.), *cert. denied*, 114 S. Ct. 604 (1993), also do not hold that evidence of pretext alone will support an inference of a conspiracy. For instance, in *Bolt*, the Court of Appeals specifically determined that when relying on circumstantial evidence of a conspiracy, a plaintiff must show both a nonlegitimate motive for entering into the conspiracy *and* must adduce evidence tending to exclude the possibility that the alleged co-conspirators acted independently. *Id.* at 819.

circuits represented has determined that while evidence of pretext may be probative of a Section 1 conspiracy, it will not, standing alone, create an inference that a conspiracy exists. A review of these cases also shows that in each case, prior to making its determination, the circuit court carefully reviewed all of the evidence that would tend to prove or disprove the existence of a conspiracy.

It is clear that NDPA has mischaracterized the decision and reasoning of the Court of Appeals in this case in an attempt to generate a "conflict" with the above decisions where none exists. For these reasons, NDPA's first ground for seeking a writ of certiorari must fail.

B. The Court Below Correctly Followed *Monsanto*.

NDPA is equally wrong in asserting that certiorari should be granted because the decision of the Court of Appeals in this case is "at war" with the statutory requirement of concerted action in Section 1 of the Sherman Act, and is contrary to this Court's interpretation of that statute in *Monsanto*.

NDPA bases its argument on a mischaracterization of the Third Circuit's holding. The Third Circuit Court of Appeals *did not* hold that evidence of pretext, standing alone, will permit a jury to infer the existence of a conspiracy. That said, the Court of Appeals' decision in this case is completely consistent with this Court's holding in *Monsanto*.

In *Monsanto*, this Court stated that there can be no inference of concerted action on the basis of customer complaints alone. Rather, there must be "something more" than mere complaints. There must be evidence that excludes

the possibility of independent action. 465 U.S. at 764. In *Monsanto*, this Court held that the plaintiff adduced sufficient evidence for the jury to have concluded that Monsanto and some of its distributors were parties to a conspiracy. For instance, there was evidence of an agreement to maintain prices and circumstantial evidence that linked the termination of the plaintiff to that agreement.[11]

Monsanto's requirement that a plaintiff adduce "something more" than customer complaints, and that the evidence should tend to prove that the manufacturer had a commitment to a common scheme, is met in this case. As noted in the Third Circuit's opinion, respondents adduced strong evidence of coercion by the NDPA, including threatened boycotts. App., A28.

There is evidence that FSC acted in direct response to this coercion by instituting the surcharge on drop shipments. App., A32. There is evidence that FSC changed its previous course of conduct in attempting to eliminate the 800-number dealers after it had sold to them for years.[12] CA App. 624. There is evidence that FSC acted contrary to its own

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[11] In *Monsanto*, this Court determined that the case properly went to the jury despite strong evidence from the manufacturer that no conspiracy existed: "[W]e cannot say that the courts below erred in finding that [plaintiff] produced substantial evidence of the concerted action required by §1 of the Sherman Act, and that -- despite the sharp conflict in evidence -- the case properly was submitted to the jury." 465 U.S. at 468, n.14.

[12] In 1989, FSC's corporate vice president told an audience of retailers that sales to 800-number dealers made up 20% of the wallcovering business's total sales. CA App. 624.

economic interests in instituting a seven percent surcharge without conducting any economic analysis to determine the amount of surcharge required to help it recoup the alleged "additional costs" of drop shipments. App., A33. There was additional evidence that NDPA pressure on FSC continued even after the surcharge was implemented and, in response, FSC adopted a so-called "local trading area" policy, whereby 800-number dealers were prohibited from selling FSC products outside their local area. App., A15-16. Rather than confront the adverse affects of a boycott by NDPA members, FSC joined forces with NDPA in a common scheme to eliminate 800-number dealers as NDPA competitors. Thus, a contract or common scheme existed between NDPA and FSC.

The evidence that FSC capitulated to NDPA pressure, and joined forces with NDPA to eliminate 800-number dealers, is carefully documented in the minutes of FSC's management committee. CA App. 290, 304, 309. Thus, the jury will be able to decide FSC's complicity in the alleged conspiracy through a well-documented record of FSC's internal deliberations. By contrast, there is absolutely no contemporaneous documentary evidence that FSC's decision to eliminate 800-number dealers was motivated by any concern other than capitulation to NDPA pressure.

NDPA's analysis fails to note that, unlike *Monsanto*, which was decided on a full trial record, this case was decided on a motion for summary judgement. In that regard, the recent teachings of this Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. ___, 119 L. Ed. 2d 265 (1992), are significant. In *Kodak*, this Court stated that antitrust claims should be resolved on a "case-by-case basis, focusing on the 'particular facts disclosed by the record.'"

504 U.S. at ___, 119 L. Ed. 2d at 284 (citations omitted). Further, this Court held that the nonmoving party's inferences need only be "reasonable" in order to reach the jury. 504 U.S. at ___, 119 L. Ed. 2d at 285. In this case, it is clear that respondents' inferences of a conspiracy between FSC and NDPA are more than merely "reasonable," they are compelling.

Thus, the Third Circuit's opinion in this case readily conforms to the substantive and procedural framework set down by this Court in *Monsanto* and *Kodak*.

C. Petitioner's Remaining Arguments For Certiorari Are Meritless.

NDPA argues that this case provides an ideal context for this Court's review because the case is devoid of factual dispute on any dispositive issue and because the judgment below turns on the legal standard employed by the Third Circuit. Petition at 20-21.

That is hardly the case. The record is replete with evidence that NDPA pressured FSC and other manufacturers to eliminate 800-number dealers, that FSC capitulated to that pressure, and that FSC joined NDPA's "battle against 800 number operators" by imposing its drop shipment surcharge and local trading area policy. In the absence of an admission by NDPA and FSC that their conduct constituted a conspiracy in unreasonable restraint of trade, it remains a disputed issue of fact to be resolved by the jury. Thus, NDPA's assertion that the record is devoid of factual disputes is simply untrue.

NDPA argues that the purported split among the circuits "has disruptive economic and jurisprudential ramifications." Petition at 21-23. As was shown above, the "split" in the circuits was fabricated by NDPA for the purposes of its petition. If anything, a survey of circuit court decisions reflects a remarkable uniformity among the circuits in their interpretation and application of *Monsanto* and, in the context of summary judgment motions, of *Kodak*. Thus, the decision by the Court of Appeals in this case is not likely to encourage forum shopping. Based on a thorough review of all of the evidence of conspiracy in this case, respondents believe that the Eighth Circuit (where the *Lovett* case was brought) would have held as did the Third Circuit and reversed the district court's grant of summary judgment. Thus, NDPA's policy arguments also must fail.

II. NDPA'S SECOND QUESTION PRESENTED

A. The Court Below Correctly Applied the *Hydrolevel* Decision.

In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), this Court held that a trade association may be held liable under Section 1 for the antitrust violations of its agents committed with apparent authority. The Court emphasized the economic power that trade associations such as ASME wield in the nation's economy. The Court noted that trade association officials, who are also independent businessmen, have the opportunity, through their role in the trade association, to harm their competitors when they act in the name of the association. *Id.* at 570-571. Thus, the Court determined that a trade association can be a party to a Section 1 conspiracy.

In order to hold a trade association liable, all that is needed is the action of an agent of that trade association acting with apparent authority. The Court held that "the apparent authority theory is consistent with the congressional intent to encourage competition." *Id.* at 570. The Court emphasized that the theory of apparent authority has been used to impose liability upon principals for the misdeeds of agents in a wide variety of areas. *Id.* at 568. It also stated that the apparent authority theory benefits both the trade association and the public because "it is . . . for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal." *Id.* at 567 (citing Restatement (Second) of Agency §262 (1984), Comment a, p. 572).

NDPA argues that the Third Circuit in this case did not properly apply Hydrolevel. However, a closer review of their petition reveals that it is the *Hydrolevel* decision they are criticizing. While not articulating it, NDPA is implicitly asking this Court to overrule the *Hydrolevel* case for policy reasons.[13] Clearly, if this Court is unwilling to do so, the holding of the case is still the law of the land and is properly applied to the this case.

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[13] For instance, NDPA notes that the dissent in *Hydrolevel* pointed out that the majority decision could be read as exposing all nonprofit associations to "strict liability in treble damages." Petition at 27. NDPA also argues that the "decision below may be expected to restrict traditional trade association activities by focusing upon the conduct of a trade association's staff rather than its members." Petition at 29. It is not the decision below that creates such a result; it is this Court's decision in *Hydrolevel*.

Thus, the question presented to the court below was whether the NDPA could be held liable under Section 1 for the acts of its agents. The court answered that question in the affirmative because it determined that NDPA agents, whose actions violated Section 1, were acting with the apparent authority of NDPA.

The court found that Petit went beyond merely voicing retailers' complaints to manufacturers and engaged in "actually coercing (or attempting to coerce) them into cooperating in eliminating 800-number dealers." App., A33. Further, the court noted evidence that Petit emphasized to manufacturers the anger felt by the retailers. *Id.* The court stated that "[s]uch evidence, *when viewed against the existing backdrop of urgings from NDPA officers and editors that retailers should support only those manufacturers who support them,* could imply a threat of a retailers' boycott if manufacturers did not take steps to help eliminate 800-number dealers from the marketplace." *Id. (emphasis added).* This statement is the key to the court's holding on apparent authority.

NDPA asserts that the Court of Appeals pointed to no conduct of NDPA that could have caused a reasonable third party to believe that Petit was acting in the ordinary course of business by threatening a retailers' boycott of manufacturers. Petition at 26. This assertion is completely untrue. The Court of Appeals' decision is replete with references to record evidence that strongly supports the inference that Petit was acting on behalf of NDPA and its membership when he threatened a boycott and that NDPA supported, acquiesced in and even ratified his conduct.

For instance, the court began by stating that "in the late 1970's and early 1980's, conventional retailers in the NDPA threatened to cease purchasing products from manufacturers who continued to do business with the 800-number dealers, whom they referred to as 'pirates.'" App., A12. Further, "[t]he NDPA *itself* actively campaigned against 800-number dealers by lobbying manufacturers. . . ." *Id. (emphasis supplied).* The court then discussed the FTC action against NDPA and the entry of a consent order between NDPA and the FTC. App., A13-A14. The court stated clearly that since the entry of the consent decree, NDPA "modified its lobbying efforts to some extent, *but it has not ceased them.*" App., A15 (emphasis added).

The court next noted that "the sentiment against 800-number dealers continued to escalate even after the consent decree was entered." App., A15. When manufacturers such as FSC began to respond to NDPA's pressure, the NDPA noted in its official publication that "there are signs that telling your troubles to suppliers eventually will be heard and some remedy may result." App., A18. Further, Petit wrote to the NDPA Board of Directors heralding FSC's restraint as "a major step forward in *our battle* against the 800 number operators." CA App. 693 (emphasis added).[14] Petit also wrote to FSC's president, expressing *"[o]n behalf of the members of our decorating products association* . . . our appreciation for your actions." CA App. 70. These actions

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[14]The NDPA Board of Directors' knowledge of, and acquiescence in, the actions of its agents is also clear from the record in the official board minutes of a meeting NDPA President Clyde Morgan had with manufacturers in which he urged them to take action against 800-number dealers. CA App. 177-184, 1091.

are a clear indication that NDPA ratified the actions taken by its agents that produced the result NDPA sought.

Further, NDPA publications editor John Rogers wrote an editorial in the *Perspective* column of NDPA's *Decorating Retailer* discussing retailer opposition to 800-number dealers and stating that "ultimately, the answer for the individual dealer is that given by [NDPA president] Wells: 'I will support those who support me.'" App., A20. Rogers subsequently testified, that to his knowledge, there has not been an occasion when a comment published in the *Perspective* column has contravened NDPA policy. App., A20.

Thus, there can be no question that NDPA was in the business of trying to eliminate 800-number dealers. When Robert Petit, the chief executive officer of NDPA, threatened boycotts to achieve this very result, it was *entirely* reasonable for third parties hearing such threats to believe that he was acting in the regular course of NDPA's business. Based on "the existing backdrop of urgings from NDPA officers and editors that retailers should support only those manufacturers who supported them," (App., A33), it is entirely reasonable for a jury to find that Petit and other agents of NDPA were acting with the apparent authority of NDPA.

NDPA argues that, after the FTC consent order was entered, NDPA began to comply with the antitrust policies set forth in that order. Petition at 6-7, 26-27. This purported compliance directly conflicts with the evidence of the *actions* NDPA was taking through its officers and agents, the statements it was making in its official publications, and the notations it was making in its Board of Director's minutes. This conflict creates an issue of material fact for

the jury and cannot and should not be resolved by the district court on a motion for summary judgment.

NDPA's discussion of supposed differences between NDPA and ASME, the trade association in *Hydrolevel*, misses the point. In *Hydrolevel*, the activity that was found to have violated Section 1 was the writing of a response to an "inquiry" regarding an industry standard by members of a subcommittee of ASME. The response was treated as an "unofficial communication." 456 U.S. at 561. In this case, by contrast, the activity alleged to violate Section 1 was undertaken by the presidents and chief executive officer of NDPA. The speeches made by these individuals and the meetings they had with manufacturers and retailers were recorded in official NDPA publications and in the minutes of the Board of Directors. The activity was undertaken at the highest levels of the organization, and not, as in *Hydrolevel*, at the subcommittee level.

Further, unlike ASME, which is a neutral standard setting entity, the sole purpose of NDPA is to advance the economic goals of its membership. The primary goal of NDPA's membership, for years, has been to eliminate the competitive threat posed by 800-number dealers. App., A12, A117. Thus, the *Hydrolevel* decision is properly applied to this case and indeed was properly applied by the court below.

B. The Decision Below Properly Found Concerted Action Under Section 1.

NDPA next asserts that the decision of the Court of Appeals eviscerates the requirement of concerted action in a Section 1 case because "the decision below finds no such

concerted action by NDPA, and instead focuses on the individual actions of NDPA's alleged apparent agents." Petition at 28-29.

As the Court of Appeals noted, NDPA is an association of competing wallpaper dealers. "As such, when NDPA takes action it has engaged in concerted action so as to trigger potential section 1 liability." App., A25. Indeed, NDPA was aware of this fact and so informed its members. NDPA informed its members that "NDPA, as a group of competitors, was 'already considered to be an "agreement."'" App. A14 (citing CA App. 430). Further, NDPA guidelines for conducting meetings also acknowledge that "'a trade association is, by definition, a combination of competitors.'" *Id.* (citing CA App. 740).

The concerted action requirement of Section 1 is not eviscerated in this case, it is merely met in a different way than it was met in the *Hydrolevel* case. In *Hydrolevel*, the requirement of concerted action was met on the basis of a conspiracy between ASME and others. Here, it is met because NDPA is a trade association, which, as a combination of competitors, can violate the antitrust law when it engages in anticompetitive conduct.[15]

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[15]In her dissent to the 1993 Opinion, Judge Roth noted: "There is no question that an association is a 'combination' within the meaning of Section 1 of the Sherman Act. Although a conspiracy requires more than one person, an association, by its very nature a group, satisfies the requirement of joint action. Thus, any association activity which restrains interstate commerce can be violative of Section 1 even if no one acts in concert with the association." App., A120-121 (citing G.D. Webster, the Law of Associations §9a.01[1], 9A3-4 (1991)).

When Petit and the other NDPA officials and agents acted, they did so, as was shown above, on behalf of NDPA and all of its members. Thus, for antitrust purposes, there is no difference between Petit urging manufacturers to eliminate 800-number dealers (and threatening a boycott if they did not), and all 3,300 NDPA members doing the same thing in unison. The concerted action requirement is clearly met in this case.

C. Petitioner's Remaining Arguments For Certiorari Are Meritless.

NDPA argues that the decision below will restrict traditional trade association activities by focusing upon the conduct of a trade association's staff rather than its members, and forcing the members to "police" the conduct of the staff. Petition at 29. Such "policing" is exactly what this Court had in mind when it stated in *Hydrolevel* that "ASME is in the best position to take precautions that will prevent future antitrust violations." 456 U.S. at 576. Here, NDPA, through its membership, is in the best position to monitor and regulate the actions of its staff, including chief executive officer Robert Petit and publications editor John Rogers. Permitting the issue of NDPA's antitrust liability in this case to go a jury will serve to impart to all trade associations the lesson of *Hydrolevel* that trade associations cannot avoid liability for anticompetitive conduct by claiming that their representatives were never oficially authorized to engage in unlawful activity.

CONCLUSION

For all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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NO. 94-1363

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE NATIONAL DECORATING
PRODUCTS ASSOCIATION, INC.,
Petitioner,

v.

ALVORD-POLK, INC., et al.
Respondents.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit

**BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

CERTIFICATE OF SERVICE

I certify that I have, this 20th day of March, 1995, caused three copies of the Brief In Opposition To Petition for a Writ of Certiorari in this case to be deposited in the United States mail, first-class postage prepaid, addressed to each of the following:

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